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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 BRENT NICHOLSON, *et al.*,

9 Plaintiffs,

10 v.

11 THRIFTY PAYLESS, INC., *et al.*,

12 Defendants.
13

No. C12-1121RSL

SECOND ORDER ON REMAND

14 This matter comes before the Court on “Plaintiff Nicholson’s Motion for Order on
15 Remand” (Dkt. # 200) and “Defendants’ Motion for Release of Escrow Funds” (Dkt. # 202).¹
16 The Ninth Circuit Court of Appeals remanded this matter to the undersigned “to address the
17 disposition of funds held in escrow.” Dkt. # 196 at 3. Having reviewed the memoranda,
18 declarations, and exhibits submitted by the parties,² the Court finds as follows:

19 On November 24, 2015, Nicholson and defendants agreed to place \$2.2 million into an
20 escrow account “to maintain funds awarded to [defendants] in a judgment and attorney fee
21 award entered in the case *Brent Nicholson, et al., Plaintiffs, v. Thrifty Payless, Inc and Rite Aid*
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23 ¹ Nicholson’s requests to strike defendants’ motion and award sanctions are DENIED. Both
24 parties seek affirmative relief from the Court: the filing of competing motions or cross-motions is to be
25 anticipated in such circumstances.

26 ² This matter can be decided on the papers submitted. The parties’ requests for oral argument are
therefore DENIED.

SECOND ORDER ON REMAND

1 *Corporation*, Cause No. 2:12-01121-RSL (W.D. Wash.).” Dkt. # 170-1 at 33. The Escrow
2 Deposit Agreement noted that Nicholson was appealing the award, that he had agreed to deposit
3 the \$2.2 million in lieu of a supersedeas bond, and that defendants agreed not to execute on the
4 judgment and fee award while the appeal was pending. *Id.* The issue remaining in this case is
5 whether the \$2.2 million was deposited in the escrow account to serve as security for only the
6 award entered against Nicholson personally or for the entirety of the judgment and award.

7 The purpose of contract interpretation is to ascertain the intention of the parties at the
8 time of contracting. *Int’l Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 282
9 (2013). The Supreme Court of Washington has rejected a “plain meaning” analysis, recognizing
10 that “[a] word is not a crystal, transparent and unchanged; it is the skin of a living thought and
11 may vary greatly in color and content according to the circumstances and the time in which it is
12 used.” *Berg v. Hudesman*, 115 Wn.2d 657, 664 (1990) (quoting *Towne v. Eisner*, 245 U.S. 418,
13 425 (1918) (Holmes, J.)). Instead of focusing exclusively on the written words, “[d]etermination
14 of the intent of the contracting parties is to be accomplished by viewing the contract as a whole,
15 the subject matter and objective of the contract, all the circumstances surrounding the making of
16 the contract, the subsequent acts and conduct of the parties to the contract, and the
17 reasonableness of respective interpretations advocated by the parties.” *Id.* at 667 (quoting
18 *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254 (1973)). Although extrinsic evidence
19 cannot be admitted to change, add to, or subtract from the written agreement, “[i]f the evidence
20 goes no further than to show the situation of the parties and the circumstances under which the
21 instrument was executed, then it is admissible.” *Id.* at 669 (quoting *J.W. Seavey Hop Corp. v.*
22 *Pollock*, 20 Wn.2d 337, 348-49 (1944)).

23 At the time the Escrow Deposit Agreement was executed, Nicholson and the eleven LLC
24 plaintiffs were jointly and severally liable for the fee award referenced in the agreement. Dkt.

1 # 142 at 9.³ If, as the ordinary meaning of the words chosen by the parties suggests, the \$2.2
2 million were placed into the escrow account to ensure that funds were available to pay the
3 judgment and attorney's fee award in this case, that would include not only Nicholson's personal
4 liability, but also the debts of the LLC plaintiffs. Nicholson, however, argues that the context in
5 which the Escrow Deposit Agreement was drafted shows that the parties intended to secure only
6 his personal liabilities, citing:

- 7 ● Nicholson's pre-deposit statements regarding his intent to obtain sufficient cash
8 to secure the judgment and award against him personally (Dkt. # 149; Dkt.
9 # 150 at ¶ 17);
- 10 ● the terms of an interim agreement between Nicholson and defendants designed
11 to maintain the status quo while they negotiated an alternative security
12 agreement (Dkt. #170-1 at 2-3);
- 13 ● the lack of any explicit, contemporaneous statement on defendants' part that the
14 funds in the escrow account were to secure payment of both Nicholson's
15 and the LLC's liabilities in this case;
- 16 ● the statement in the Escrow Deposit Agreement that Nicholson was appealing
17 the judgment and award (Dkt. # 170-1 at 33); and
- 18 ● Nicholson's post-appeal efforts to recover the funds deposited in the escrow
19 account consistent with his belief that the funds were maintained to secure
20 only the judgment and award entered against him personally (Dkt. # 163;
21 Dkt. # 170-1 at 10).

22
23 Nicholson asserts that he never intended to put his personal funds at risk to backstop
24

25 ³ The judgment entered on February 5, 2015, was for overpaid rents and was entered against
26 Nicholson and No One to Blaine, LLC.

1 defendants' judgment and fee award against the LLC plaintiffs. The evidence in the record
2 amply supports a finding that Nicholson's original plan was to secure only his own liabilities and
3 that he never wanted to put money behind the LLC plaintiffs. The objective manifestations of the
4 parties' intent at the time of contracting, however, differed from Nicholson's starting position
5 and preferred outcome.

6 Shortly after the Court found that Nicholson and the eleven LLC plaintiffs were jointly
7 and severally liable for \$1,819,340.21 in attorney's fees and costs, defendants began collection
8 efforts against all twelve plaintiffs. On July 8, 2015, Nicholson moved for a "stay of execution
9 of the judgment and fee order *against him* pending appeal" and offered to make alternative
10 security available in that context. Dkt. # 149 at 1 (emphasis added). Defendants were willing to
11 discuss the possibility, and the parties' negotiations through August 17, 2015, were arguably
12 based on the proposal made in the motion to stay. Nicholson agreed to sell property held by
13 another one of his LLCs and to place his share of the proceeds into an escrow account to pay any
14 award of attorney's fees that survived the appeal. Defendants, who were the tenants at the
15 property Nicholson proposed to sell, agreed to extend the lease period on the property (thereby
16 increasing its market value) and to forego further efforts to execute on the judgment and award if
17 the escrow account were fully funded. References to Nicholson's motion papers during this
18 period at least raise an inference that the parties were focused on ways to safeguard the judgment
19 defendants had against Nicholson personally and to stop collection efforts against his assets.

20 By mid-August 2015, the parties were in the midst of negotiating the paragraph of the
21 amended lease that would contain the terms of the parties' agreement regarding the purpose,
22 funding, and effect of the escrow account. As part of that paragraph 13, the landlord/seller
23 acknowledged that a portion of the anticipated sale proceeds would be placed in escrow to
24 satisfy any fee award in this case that survived the appeal. Dkt. # 203-2 at 3-4. At that point,
25 Nicholson's attorney apparently recognized some ambiguity in the language as drafted and
26 attempted to make clear that the relevant judgment and fee award was "against one of Landlord's

1 members,” *i.e.*, Nicholson. Dkt. # 203 at ¶ 14. Defendants’ response was to rewrite paragraph 13
2 to state that the escrow fund was being created and held “as security for payment of Tenant’s
3 Claim” and to define “Tenant’s Claim” as the judgment and fee award that was entered in this
4 case “against Landlord’s member Brent Nicholson *and other Plaintiffs*.” Dkt. # 203-3 at 3-4
5 (emphasis added). Nicholson’s litigation counsel proposed a version of paragraph 13 that deleted
6 the term “Tenant’s Claim” and specified that use of the funds would be “in accordance with the
7 terms of Nicholson’s motion for a stay pending appeal,” which, as described above, disclosed a
8 plan to obtain sufficient cash to secure the judgment and award against him personally. Dkt.
9 # 203-4 at 3. Ultimately, the signed lease amendment states:

10 In the recent case of “*Brent Nicholson, et al., Plaintiffs, v. Thrifty Payless, Inc. and*
11 *Rite Aid Corporation, Defendants*, W.D. Wash. No. 12-cv-01121” (“the Case”) a
12 judgment and an award for attorneys’ fees has been entered in favor of Defendants
13 against Landlord’s member Brent Nicholson (“Nicholson”) and other Plaintiffs
14 (“Tenant’s Claim”). The judgment and attorney fee award is currently subject to an
15 appeal to the United States Court of Appeals for the Ninth Circuit, but no
16 supersedeas bond has been filed. Nicholson has filed a motion for a stay pending
17 appeal in the Case, in which he has offered to agree that his share of net proceeds
18 of any sale of the Premises by Landlord, up to \$2.2 million, shall be placed into a
19 blocked account subject to the terms of a proposed Order staying any collection
20 activity by Tenant pending the conclusion of the appeal. . . . Landlord has agreed,
21 and hereby agrees that Nicholson’s approximate 65% of the proceeds of any sale
22 of the Premises . . . shall be placed into an escrow account . . . which sum shall
23 remain in escrow as security for payment of Tenant’s Claim at the time and
24 consistent with a final ruling of the Court of Appeals regarding Tenant’s Claim.

25 Dkt. # 170-1 at 6-7. Although the final language of the amended lease acknowledges
26 Nicholson’s motion to stay and his appeal (as does the subsequent Escrow Deposit Agreement),
defendants did not accede to Nicholson’s request that the disposition of the funds be limited by
the terms of the motion.

The amended lease, through which the parties set forth their agreement for obtaining the
funds that were to be put into escrow, gives context to the Escrow Deposit Agreement’s

1 statement that the parties “enter into this agreement to maintain funds awarded to [defendants] in
2 a judgment and attorney fee award entered in [this] case” Dkt. # 170-1 at 33. Nicholson
3 may have wanted to secure only his own, personal liability, but the negotiations did not go his
4 way. Defendants rejected Nicholson’s efforts to limit the use of the escrowed funds to secure the
5 liabilities of “one of the Landlord’s members” or as set forth in his original motion to stay,
6 instead insisting on language authorizing use of the escrow fund to pay the “Tenant’s Claim,”
7 defined as the judgment and fee award against Nicholson and the other LLC plaintiffs.

8 In their declarations, Nicholson and his attorney barely acknowledge the substantive
9 negotiations regarding the relevant lease amendment language, and neither provides any
10 extrinsic evidence related to the interpretation of the words that were actually used in paragraph
11 13. That Nicholson hoped and, until the very end, intended to secure only the judgment entered
12 against him, personally, can be credited *in toto*, but it cannot be used to alter, add to, or subtract
13 from the contract terms as they were actually written. Oliver v. Flow Int’l Corp., 137 Wn. App.
14 655, 660 (2006). Courts applying Washington law “attempt to determine the parties’ intent by
15 focusing on the objective manifestations of the agreement” and will “not interpret what was
16 intended to be written but what was written. Hearst Commc’ns, Inc. v. Seattle Times Co., 154
17 Wn.2d 493, 504 (2005). Nicholson offers extrinsic evidence of his original intent in proposing
18 alternative security and his unilateral post-contracting actions, as well as ambiguous references
19 to his appeal and motion to stay in the lease amendment and/or Escrow Deposit Agreement. He
20 contends the evidence illuminates certain terms in the deposit agreement because it reveals a
21 mutual intent to safeguard funds only for the payment of Nicholson’s personal liabilities. This is
22 an improper use of extrinsic evidence because the result Nicholson seeks is to insert a new
23 limitation into the deposit agreement, thereby altering its terms. The express terms of the
24 agreement do not limit the use of the escrow funds to satisfying Nicholson’s personal liability,
25 and he offers no justification for inserting the phrase “against Nicholson” into the agreement’s
26 statement of purpose. The context in which the Escrow Deposit Agreement arose does not help

1 him either. Defendants twice rejected Nicholson's efforts to insert a limitation on the use of the
2 escrowed funds into the underlying lease amendment, and Nicholson offers no plausible
3 alternative interpretation of "Tenant's Claim" that would support such a limitation. Based on the
4 existing record, Nicholson has not raised a genuine issue of fact regarding the intent of the
5 parties at the time of contracting.
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7 For all of the foregoing reasons, Nicholson's motion to release funds (Dkt. # 200) is
8 DENIED and defendants' motion to release funds (Dkt. # 202) is GRANTED. It is hereby
9 ORDERED that the \$2.2 million of funds held in Commerce Bank of Washington's escrow
10 account, plus any interest accrued thereon, be released to defendant Thrifty Payless, Inc., c/o
11 Van Kampen & Crowe PLLC, 1001 Fourth Avenue, Suite 4050, Seattle, WA 98154, within
12 seven days of receipt of this Order.
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15 DATED this 29th day of August, 2019.

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18 Robert S. Lasnik
19 United States District Judge
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